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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1949

No. 532

THE UNITED STATES GRAPHITE COMPANY, *Petitioner*

v.

CHARLES SAWYER, Secretary of Commerce, *Respondent*

PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION.

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Counsel for Petitioner.

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IN THE

Supreme Court of the United States

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No. 532

THE UNITED STATES GRAPHITE COMPANY, *Petitioner*

v.

CHARLES SAWYER, Secretary of Commerce, *Respondent*

PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION.

In its petition for a writ of certiorari, petitioner advanced seven reasons for the granting of a writ in this case. Respondent ostensibly opposes the petition solely by argument that the courts below correctly decided the issues of this case on their merits, and, therefore, that it is not an appropriate case for this court to review by certiorari. Only in a few footnotes and by occasional innuendo in his argument does the respondent make reference to the reasons set forth by the petitioner as grounds for the issuance of a writ.[1]

In effect, the respondent admits to this Court that most of the petitioner's reasons for the granting of a writ are valid, but asks this Court to deny certiorari because he claims the decision below is correct. This Court is thereby requested to pass upon the merits of the issues involved without opportunity to hear the petitioner's case on the substantive questions and without giving petitioner the

[1] These references to petitioner's reasons are discussed briefly later in this Reply.

right to present its case in full and to argue the matter orally before the Court.

This is especially true as respondent has argued the case on false issues which this petitioner did not present to the Courts below. In order to make it appear that the decision below needs no review here and that it is based on long-standing precedents established by decisions of this Court (Respondent's Brief in Opposition, page 14), respondent has attempted to obscure the true issues presented and decided below. To make this statement perfectly clear to the Court a short summary of the contentions of the parties and the decision of the majority below are necessary.

From the beginning of this litigation petitioner has contended, and respondent has never denied, that Section 124(f)(1) covers two subjects:

(1) The determination of whether particular physical facilities were necessary in the interest of national defense;

(2) The amount of cost which taxpayers are entitled to amortize for tax purposes during the emergency period on account of the ownership of the facilities determined to be necessary.

Petitioner's contention at all times has been that Section 124(f)(1) gave the War Production Board (in the statute, the Secretaries of War and Navy) jurisdiction over only the first of these two matters; namely, jurisdiction to determine the necessity of facilities. Petitioner has contended that once the necessity of facilities was determined the Board's jurisdiction ended and that it had no control over the amount of cost to be amortized.

On the other hand, respondent contended below that the War Production Board had been granted jurisdiction over both the necessity of facilities and the amount of cost to be amortized.

The District Court sustained respondent and held that since the Board's jurisdiction over cost had been reasonably

exercised by certification of excess war cost only (35 percent of entire cost), the Courts could not interfere with the exercise of administrative discretion.

Now, respondent would have this Court believe that the sole question in issue is whether the War Production Board reasonably exercised its jurisdiction over the amount of cost to be amortized (Respondent's Brief, page 14). The respondent assumes that Section 124(f)(1) confers upon the Board jurisdiction over both (1) the necessity of facilities and (2) the amount of cost which owners of necessary facilities may amortize. This he does by stating that the question is "whether such reasonable exercise of discretion may be set aside by mandamus," and by further stating that this Court has uniformly answered the question in the negative, citing numerous cases. (Respondent's Brief, p. 14)

The cases cited and the argument which follows (Respondent's Brief, pp. 14-16) are all thus directed to a false issue.

The real issue between the parties, and the one which was decided by the court below, is whether Section 124(f)(1) gives the War Production Board jurisdiction to determine the amount of cost of necessary facilities which can be amortized during the emergency period.[2]

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[2] In the interest of brevity, petitioner has limited its discussion to one of the two statutory questions involved, i.e., to the question of the Board's jurisdiction over amount of cost. What is said here on that question is equally applicable to the question of whether the Board had power to strike from Section 124(f)(3) the provision giving taxpayers six months after acquisition of a facility within which to file an application for a Necessity Certificate. Petitioner submits that Section 124(f)(3) is a mandatory directive to the Commissioner of Internal Revenue relating to the validity of a certificate and its effect for amortization purposes. There is nothing in that section or in Section 124(f)(1) granting to the administrative officer any jurisdiction over the time of applications. Yet the Board reached beyond the confines of its statutory power and nullified an express Congressional right conferred upon taxpayers. The case law applicable to these circumstances is that enunciated by Mr. Justice Brandeis in *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, and other cases cited in the Petition for Writ, at page 31.

The issue is not, as respondent implies, whether the Board properly and reasonably exercised its jurisdiction over the amount of cost to be amortized, when it determined that only excess war cost (assumed to be 35 percent of entire cost) could be amortized.

Restated, the question here is whether the Board had any lawful authority over the amount of petitioner's annual amortization deduction. It is not, as respondent argues, whether that authority was reasonably applied.

The case of *Wilbur* v. *United States*, 281 U. S. 206, so strongly relied upon by respondent, discloses the fallacy of respondent's position. In that case, this Court first took up and decided the question as to whether the challenged decision of the Secretary of Interior had been made "in the exercise of lawful authority." Supra, at p. 218. Immediately thereafter in its opinion this Court sets out the rules for mandamus which respondent quotes at pages 14-15 of his brief. Finally, this Court's opinion states at page 221:

> "It is apparent that, *with the question of the Secretary's authority resolved against the relators,* the only question open in this proceeding is whether the decision * * * was given in the discharge of a ministerial duty controlled by mandamus or of a duty requiring the exercise of judgment and discretion not thus controllable." (Italics supplied)

Respondent has attempted to hurdle the question of "lawful authority" to act and has dealt only with the question of the reasonableness of the action. If the War Production Board had no lawful authority over the amount of cost, no amount of reasonableness can justify its determination of the amount of cost.

Riverside Oil Co. v. *Hitchcock,* 190 U. S. 316, *Work* v. *Rives,* 267 U. S. 175, and *Adams* v. *Nagle,* 303 U. S. 532 (Respondent's Brief, p. 16), all fall in the same category as the *Wilbur* case.

What has beeen said about those cases is also true of the other decisions of this Court cited by respondent. For example, a careful reading of the early case of *Decatur* v. *Paulding,* 14 Pet. 497, discloses beyond argument that the Court was dealing with a situation in which the administrative official had been granted jurisdiction over the subject matter involved. It is not a case, as is the case at bar, where the question is whether the official had jurisdiction over the subject matter—here, the amount of the cost to be amortized under Section 124.

The instant case is like *Waite* v. *Macy,* 246 U. S. 606, where the Court held through Mr. Justice Holmes that the Tea Board had exceeded its statutory authority in passing upon the quality of tea which might be imported. Also *Garfield* v. *United States ex rel Goldsby,* 211 U. S. 249.

If the principles contended for by respondent were applied to the real issue in this case, it would mean that the jurisdiction and authority of an administrative officer can always be extended beyond the limits intended and fixed by Congress by the mere assertion of the officer that the statute under which he acts has more than one meaning. (See Respondent's Brief, p. 16.)

This Court would be powerless to confine the actions of administrative officers to their legal limits if respondent's argument is accepted. Scores of decisions made by this Court must be wrong if the courts are powerless to decide whether an administrator has jurisdiction or authority over a particular subject matter in cases where the statutory language leaves room for difference of opinion.

But there has scarcely been a term during which this Court has not been called upon to adjudicate the question of whether a statute confers upon an administrator the power which he undertook to exercise. And never has the Court applied the rule of the cases relied upon by the respondent. See, for example, *Morrill* v. *Jones,* 106 U. S. 466; *United States* v. *Symonds,* 120 U. S. 46; *Garfield* v. *United States ex rel Goldsby, supra; Waite* v. *Macy, supra;*

Payne v. *Central Pacific R. Co.*, 255 U. S. 228; *Work* v. *Louisiana*, 269 U. S. 249 and cases cited at 254-255; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599; *Manhattan G. E. Co.* v. *Commissioner of Int. Rev.*, 297 U. S. 129; *Taft* v. *Helvering*, 311 U. S. 195; *Bartels* v. *Birmingham*, 322 U. S. 126. Many cases are also collected by Mr. Justice Brandeis in *Morrison* v. *Work*, 266 U. S. 481, footnotes 7 and 8 at p. 487.

The case at bar is not unlike the case of *Garfield* v. *United States ex rel. Goldsby, supra.* There a writ of mandamus was granted by this Court to compel the Secretary of Interior to undo his unlawful action in erasing from the approved rolls of citizenship in an Indian Nation the name of one who had received an allotment certificate and was in possession of the allotted land.

Here, the Congress has directed that the entire cost of war-need facilities, acquired through private financing, should be amortized over the emergency period at the election of the taxpayer upon two conditions: (1) a determination that the facilities are necessary in the interest of national defense, and (2) the filing of an application for a Certificate not later than six months after acquisition. The War Production Board in its letter of predetermination (R. 35-36), as interpreted by the Thomas affidavit (R. 41-52), determined that petitioner's facilities were necessary in the interest of national defense. Application for a Certificate was made within six months after acquisition (R. 13-14). The Board, acting beyond the scope of its authority, issued a Certificate which went further than a determination of the necessity of the facilities in the two respects on which Congress had delegated no discretionary authority. First, the Board crossed out of the Certificate by means of red pencil those facilities which petitioner had acquired prior to the date of its application, and second, it limited petitioner's amortization deduction, for the facilities acquired after application, to 35 percent of the entire cost (R. 17), that amount representing what the Board presumed to be the excess war cost of those facilities. (R. 49).

On these facts it is readily apparent that nothing in the cases cited by respondent (Respondent's Brief, 14-16) will prevent the issuance of mandamus directing the War Production Board to strike the two limitations, which were beyond the scope of its delegated authority, from petitioner's Certificate of Necessity. This Court approved the comparable remedy of injunction where an administrative board had somewhat similarly exceeded its authority. *Waite* v. *Macy, supra.* See also *Kendall* v. *United States,* 12 Pet. 524. And in *Ex Parte Young,* 209 U. S. 123, this Court had occasion to state (at p. 159):

> "An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer."

Why does respondent so diligently seek to avoid the issue of whether the statute conferred any jurisdiction on the Board to tamper with the amount of the amortization deduction allowable for necessary facilities? The answer is in the petition for certiorari filed with this Court. At pages 19-31, inclusive, of its Petition for Writ of Certiorari, petitioner has set forth the legislative history of Section 124. That record shows conclusively that Congress intended to withhold from the administrative body all jurisdiction over the amount of the amortization deduction of emergency facilities. Respondent has been unable to refute this evidence of the intent of Congress and has been forced to ignore it.

Petitioner does not deem it appropriate, or even proper, in a petition for a writ of certiorari to argue the merits of its case in detail. However, respondent has found no other ground than the substantive issues upon which to resist the granting of a writ. Petitioner has, therefore, been compelled to point out the completely inapposite character of the single line of cases relied upon by respondent. At the same time, petitioner wishes to point out to the Court that the only appropriate means of passing upon the substantive merit of issues so vital to national defense and safety

is to grant the petition for certiorari and give the parties an opportunity fully to present their cases.

Even though this Court has had occasion to state that it does not decide the merits of legal issues on petition for certiorari (*State* v. *Baltimore Radio Show, Inc.*, 70 S. Ct. 252), this is a case in which it would be almost impossible to draw any other conclusion if certiorari were to be denied, because respondent has contested virtually nothing in the petition except the substantive issues.

Petitioner respectfully submits that the foregoing reasons fully warrant the issuance of a writ in this case. However, because of the extreme importance of the issues, petitioner, in this Reply, will deal with two other points essential to a complete understanding of the views of the parties litigant in this proceeding. The first of these has to do with errors in the respondent's statement of the case; the second is a brief commentary on the principal reasons which petitioner has advanced for the issuance of a writ of certiorari.

Petitioner's Exceptions to Respondent's Statement of the Case.

Respondent's "Statement" (pp. 3-13) is a mixture of facts, conclusions and arguments and it has been designed to lead the Court to believe that the sole issues presented to the Courts below were that petitioner had contended that the War Production Board had abused its discretion when it shortened the period for filing an application for a necessity certificate and when it adopted the policy of including only excess war cost (35 percent of entire cost) in the certificate. As stated, these were not the questions presented to the lower Courts. The contention of the petitioner was that the War Production Board did not in either instance have any discretion to abuse, as Congress had directed when and how an application should be filed and that entire cost should be subject to amortization. It will, therefore, not be necessary to discuss in detail respondent's state-

ment. However, there are a few points which should be clarified.

In footnote 2 on page 4 of his brief, respondent implies that the Patterson Report and the Thomas affidavit are in complete agreement. The Patterson Report in no way supports respondent's contention that the War Production Board had authority to certify that only excess war costs of emergency facilities were entitled to be amortized under Section 124. Quite the opposite is true. (See Petitioner's Brief in Support of Petition, p. 25, and Record, pp. 54-57.)

In the Courts below and in its petition to this Court (pp. 32-35) petitioner contends in the alternative that even assuming that the War Production Board had discretionary power under the statute to determine that only excess war cost should be included for the purpose of the amortization deduction, the new policy which was adopted in the spring of 1944 was illegal because the same had not been published in the Federal Register, as required by law. At pages 6 and 7 respondent makes a desperate effort to show that the excess war cost rule, which was not adopted until the spring of 1944, was a part of the amended regulation which the War Department had issued on October 5, 1943[3] (respondent has included this amendment in its entirety in its appendix, p. 25). After laboring at length on pages 6 and 7 to show that the excess war cost rule was a

[3] Respondent also takes the position that the War Department amendment on October 5, 1943 embraced the War Production Board amendment on December 17, 1943, which provided that "application must be filed before construction is begun or date of acquisition" (respondent's Appendix, p. 27, ¶ 4). A comparison of this War Production Board amendment of December 17, 1943 with the War Department amendment of October 5, 1943 (respondent's Appendix, p. 25, ¶ (d)) will show that the amendment made by the War Production Board does not appear in the amendment of the War Department. Under the alternative argument advanced by petitioner in respect to the excess war cost rule, the same argument does not apply in respect to the War Production Board's action in respect to shortening the period for filing an application, as that change was published in the Federal Register while the excess war cost rule was not.

part of the amendment made by the War Department on October 5, 1943, the respondent states at page 8: "This basic change in the administration of section 124 was widely publicized, it appeared in the Federal Register, and copies of the amendment to the regulations were sent to all taxpayers who had previously filed applications, including petitioner (R. 46; and see fns. 7, 10, *infra*, pp. 9, 12)." Respondent does not deny that a change in a regulation must be published in the Federal Register, and the foregoing quotation is an admission on the part of the respondent that publication is required under the statute. This is the reason, we submit, why he has struggled so hard to make it appear that the excess war cost rule had been published in the Federal Register as a part of the War Department amendment October 5, 1943.

We will demonstrate that the excess war cost rule was not and could not have been included as a part of the amendment made by the War Department on October 5, 1943. On pages 6 and 7 respondent uses the Patterson Report to state in part what induced the War Department to terminate the granting of necessity certificates for defense plants except in a few unusual military cases. Respondent makes no reference whatever to the early part of the Patterson Report, which states that the amortization law was mandatory in character as it provides that "deduction of the entire cost of new defense plants was to be permitted during the period in which orders for war material continued" (R. 57). With this statement in the report, is it reasonable to say that the Patterson Report would, a few pages later, state that its October 5, 1943 amendment directed the granting of only excess war cost instead of entire cost? The answer is that the part of the report relied on by the respondent (R. 73-74) does not contain any statements to support the erroneous conclusion drawn by the respondent. We will briefly review that part of the report relied upon by respondent.

By the spring of 1943 it was becoming apparent that "the chief limiting factor in the production of war supplies no

longer was facility capacity but materials and manpower" (R. 72). In other words, the report says that the special amortization deduction "of the entire cost of new defense plants" (R. 57), was becoming less important to induce private capital to do the construction as the country had about caught up on defense plants. There is not a line in the report any place which indicates that the War Department had proposed any change in the provision of the statute which provided that entire cost was to be allowed as a deduction if private industry did the construction. In referring to the amendment of October 5, 1943 the Patterson Report states that "It was also provided that *certification* under this restriction *should be made only in cases of facilities* for a supply for military or naval uses, and then only after consideration of the relative advantage of government financing as against *private financing with amortization*" (R. 74) (Italics supplied). Respondent at page 7 of his brief paraphrases this quotation, but it makes no analysis of the statement. It is important to note that the statement refers only to a restriction as to certification of facilities. There is no mention of restricting the amount of cost to be deducted, and, as stated, in view of the earlier statement in the report that the statute provided for the deduction of entire cost, any such later statement would have been a contradiction. The above quotation from the report further provides that in deciding whether a particular facility (not cost) should be certified as being necessary in the interest of national defense, consideration should be given to "the relative advantage of government financing as against private financing with amortization." When the Patterson Report refers to "private financing with amortization" it necessarily must refer back to the early part of the report, which defines amortization as entire cost.

The decision made by the War Department was that the amortization deduction should be terminated, and under the statute it had a right to terminate it. However, in its termination it left the way open so that in a few special cases

where private financing in the construction was necessary in the production of supplies for the Army or Navy, such financing could be done with amortization, which meant, as the report says, the allowance of entire cost. The report states, and it was incorporated in the amendment to the regulations made on October 5, 1943, that in these unusual cases where new defense plants were necessary, consideration should be given as to whether the plant should be built with government financing or private financing, and the report would seem to indicate that wherever possible government financing was to be used, because any private financing had to be done with amortization, which meant the allowance of the entire cost deduction for tax purposes. The Patterson Report shows beyond any doubt that if any unusual cases arose after October 5, 1943 which had to be privately financed, the entire cost of the facility would be subject to amortization.

It is, therefore, absurd for the respondent to contend that the excess war cost rule was embraced in the War Department amendment dated October 5, 1943, which was duly published in the Federal Register. The amendment did not give petitioner notice of the change in respect to excess war cost.

A reading of the amendment itself (see respondent's Appendix, p. 25, item (1)) will show that there is not anything in the amendment which would place a taxpayer on notice that if it decided to invest its private capital in a defense plant and machinery its amortization deduction would be limited to excess war cost (35 percent of entire cost). The Patterson Report, relied upon by respondent, does not contain a single line to show that it had even thought of adopting a rule different from the statutory provision of entire cost where private financing was used. It is an undisputed fact that for several months after the certifying duties had been transferred to the War Production Board it had followed the War Department in including entire cost in certificates issued for defense plants and facilities. In the

Georgetown Law Journal Mr. James P. Durkin, former Chief of Section 4 of the Tax Amortization Branch of the War Production Board, a position which was similar to the one held by Mr. Sidney T. Thomas, who submitted an affidavit in behalf of respondent, states:[4]

> "When the War Production Board assumed the authority to certify, it at first adopted the statute-interpretation of the former certifying authorities by granting a 100 percent amortization deduction whenever it determined that facilities were necessary in the interest of national defense. . . ."

Mr. Durkin's statement is corroborated by the date of March 8, 1944, which is the date of the unpublished instructions of the War Production Board instructing its employees that only excess war cost should be included for emergency facilities with presumptive post-war use (R. 81). Again this is positive proof that the War Department amendment of October 5, 1943 and the amendment made by the War Production Board in paragraph (vi) of its regulations (petitioner's brief, p. 67), requiring that a necessity certificate shall not be issued unless it is to the advantage of the Government to have the facility privately financed, was not prepared for the purpose of including only excess war cost for emergency facilities with presumptive post-war use or value. These regulations were designed and approved by the President only for one purpose, which is stated in the regulations and in the Patterson report,—a necessity certificate was not to be issued unless it was to the advantage of the government to have the same privately financed. This means that if it was determined that it was to the advantage of the Government that that facility should be privately financed, which was done in the case at bar, then a certificate shall be issued and the taxpayer, if it so elects, be granted the right to deduct the entire cost of the facility for tax purposes. This was the inducement

[4] Georgetown Law Journal, Vol. 34, No. 3, p. 338.

which Congress held out to encourage private enterprise to do the constructing.

Respondent does not tell the Court that the Patterson Report shows that soon after the War Department terminated the application of Section 124 to acquisition or construction of plants and machinery except where they were used for supplies to the Army and the Navy, a protest against the termination was made by other agencies of the Government. The report states that after the October 5, 1943 amendment to the regulations, "the War Department was strongly urged to issue certificates for facilities for purposes not directly military but nevertheless claimed to be essential to national defense" (R. 74). The report shows that the Office of Defense Transportation was one of these agencies (R. 74). The transfer to the War Production Board was, therefore, made to lift the termination which had been made by the War Department so as to extend the amortization provision to facilities not directly military in character (R. 74-75). The War Production Board was selected, the report says, so that the granting of necessity certificates could be coordinated with priority ratings governing the use of critical materials (R. 75).

At page 11 of its statement, respondent implies that petitioner had notice of the change which the War Production Board had made in respect to the allowance of only excess war cost, and that notwithstanding this notice petitioner proceeded to acquire the machinery. This is not a fact. If the Court will read the amendment of October 5, 1943 made by the War Department and the amendments made by the War Production Board (Respondent's Appendix, p. 25-28), it will find that there are no statements whatever in these amendments which could have placed this petitioner on notice with respect to the unpublished excess war cost memorandum which respondent sets forth in footnote 8, page 10, of his brief.

Respondent's Almost Complete Failure to Contest Petitioner's Reasons for Granting the Writ Constitute an Admission That the Writ Should Issue.

Petitioner will very briefly discuss respondent's casual references to the principal reasons advanced for the issuance of a Writ, so that the Court will have before it the views of both parties on each reason.

1. Grave questions of public policy relating to national defense and safety are presented.

Respondent has carefully avoided direct reference to this reason. Nonetheless, respondent's statements on pages 4-5 and pages 8-11 of his brief disclose the respondent's conviction that the question is of great national importance.

Much more significant, in footnotes 9 and 18 (Respondent's Brief, pp. 11, 21-22), respondent describes the magnitude of the effect upon taxpayers of the administrative action which petitioner challenges. The importance of the question is thus admitted.

2. The decision below affects the rights and property of numerous similarly situated taxpayers.

This proposition the respondent admits (Respondent's Brief, pp. 11, 21-22), but advances an astounding proposition in an effort to answer it. He states petitioner's view will have a "necessarily disruptive and unsettling" effect, "particularly in the budgetary and tax fields" (Respondent's Brief, p. 21)[5]

Such assertion amounts to saying that the courts should not interfere because of the magnitude of the effect of the

[5] Perhaps respondent implies that tax refunds would have to be made if petitioner prevailed. Petitioner here has claimed an amortization deduction on its tax returns in 1944 and 1945 based upon the entire cost of all the facilities here in issue. Agents of the Bureau of Internal Revenue have proposed deficiencies in petitioner's tax payments, and the final disposition of the matter is being held in abeyance pending the outcome of the present litigation.

illegal administrative action. Respondent's proposition is this:

> If administrative officials make a small error inflicting a little damage on only a few, this Court may review the legality of the action and even reverse it (with the blessing of the Government), but if a major error is committed imposing large damage upon a substantial number of persons, and its correction would require time, energy and personnel, then this Court is required to shut its eyes to the illegal action and refuse even to grant a review.

If that is a correct proposition, the right of petition for certiorari should be forthwith abolished in cases of this character so that litigants will no longer be encouraged to believe that there is opportunity in this Court for redress of administrative and judicial errors.

Petitioner submits that this Court has never enunciated, and will not now adopt, explicitly or by indirection, any such policy of review by writ of certiorari.

If petitioner's contentions on the merits of this case are correct, very substantial injury has been illegally inflicted. If respondent's contentions are correct, then there is no injury. Both parties agree that if there has been illegal action, it has had very substantial adverse effect upon a number of taxpayers. In such circumstances, the issuance of a writ of certiorari is appropriate.

3. The decision below conflicts in principle with other lower court decisions interpreting Section 124.

Petitioner cited *United States* v. *Milnor Corp.*, 85 F. Supp. 931 and *American Twist Drill Co.*, 11 T. C. 200, in support of this proposition. Respondent replies in footnote 17 of his brief (p. 21) that the cases are not in conflict with the instant case because they do not involve a mandamus proceeding.

Petitioner did not contend that the two cases cited raised the same issues for decision as the case at bar. Petitioner does contend that the other courts made findings as to the Congressional intent in enactment of Section 124 which fully support petitioner here and which are squarely in conflict with the legislative intent stated by the courts below in the instant case. (Petition for Writ, pp. 17-18.)

Respondent does not, and cannot, deny that conflict. Indeed, respondent has said not one word in answer to the compelling legislative history of the meaning of Sections 124 (f)(1) and 124(f)(3). A reading of that legislative history (Petition for Writ, pp. 22-27, 28-30) will convince this Court that Congress intended Section 124 to be interpreted and administered in the manner for which petitioner contends.

4. The decision below is wrong on the substantive issues and violates legal principles laid down by this Court.

Only at this point do the briefs filed with this Court by petitioner and respondent clash. Even here, respondent has made no attempt to meet petitioner's arguments relating to statutory construction and legislative history. Instead, as demonstrated at the outset of this Reply, respondent has set up and argued a false issue. He has cited a line of cases irrelevant to the question of whether Section 124 granted the War Production Board jurisdiction over the amount of cost to be amortized and over the date upon which taxpayers must file applications in order to obtain valid Certificates of Necessity (Respondent's Brief, 13-16.)

Petitioner asks again: Where in Section 124 is the administrative agency granted any power to do more than determine whether specific physical facilities are necessary in the interest of national defense? In other words, petitioner's whole contention is that the statute gave the War Production Board no jurisdiction over the amount of cost to be amortized or over the period within which to file a

timely application. If petitioner is sustained in that contention, respondent's whole argument collapses, for nothing remains to be done but to direct the Board's successor to issue a corrected Certificate showing what its letter of predetermination (R. 35-36) already shows, namely, that the facilities were necessary in the interest of national defense.

Respondent insists upon resisting the Petition filed here solely by arguing the merits of his case on a false issue which was not presented to either Court below. Under these circumstances, this Court should not review the decision below by indirection, but should forthrightly grant the petition for issuance of a writ and thereafter hear and decide the issues after opportunity for argument and full consideration.

5. The policy of certifying only excess war cost is invalid because the rule was never published in the Federal Register as required by law and the decisions of this and other Courts.

The policy of certifying only excess war cost (estimated as 35 percent of entire cost) was not published in the Federal Register at any time. About that fact there is no dispute.

Respondent attempts to defend his failure to comply with the Federal Register Act and Court decisions thereunder by claiming that the policy of 35 percent certification was within the scope of Regulations properly published both by the War and Navy Departments and by the War Production Board (Resp's. Brief, 6-12).

In an earlier part of this Reply, petitioner has shown that the published regulations of neither the War-Navy Secretaries nor the War Production Board contained any inkling of the policy of certifying excess war costs. Petitioner will not restate that argument. However, it should be pointed out that respondent relies upon publication in the Federal Register of Section (3)(c)(vi) of the Board's regulations of December 17, 1943, as adequate notice of and

authority for certifying only excess war costs. That regulation is as follows:

> "*Government and privately financed facilities.* Necessity Certificates will be issued only where it is to the advantage of the government that the facilities in question be privately financed."

Suffice it to say that not even a "Philadelphia lawyer" can spell out of that regulation a notice that the amortization allowance would be limited to excess war cost—35 percent of entire cost—of facilities determined necessary in the interest of national defense. If this regulation is sufficient to put taxpayers on notice of the Board's 35 percent policy, the Federal Register Act has been as effectively nullified as if it had been repealed.

6. A conflict between the regulations of the Board and those of the Commissioner of Internal Revenue present a novel question which this Court should review.

Respondent devotes a footnote to this reason of the petitioner for certiorari (Resp's. Brief, footnote 14, pp. 16-17). He contends first that the administration of Section 124 was not delegated to the Commissioner, and second that the Commissioner's regulations are in accord with the action of the War Production Board.

Neither contention is correct. Section 124 is a part of the Internal Revenue Code, the administration of which is vested solely in the Commissioner except where specific authority is delegated to another agency. In the case at bar, another agency has been given limited power under one subsection of Section 124—subsection (f)(1). Petitioner submits that the power of the non-revenue agency under Section 124(f)(1) is limited to a determination of the necessity of facilities. All the residual power granted by the section remains vested in the Commissioner as the administrator of the federal revenue laws. It is not reasonable to believe that Congress would insert a section in the Internal

Revenue Code over which the Commissioner was not to have administrative jurisdiction without specifically ousting him from jurisdiction over the Section. The legislative history conclusively supports petitioner's views that the Board was granted no authority over the amount of the tax amortization deduction by Section 124. See Petition for Writ, p. 22.

The second contention of respondent with respect to the Commissioner's regulations under Section 124 is equally without merit. Respondent would have this Court believe that Section 29.124-6 of Treasury Regulation 111 (Petition for Writ, p. 63) is in accord with the Board's policy of certifying only excess war cost. When respondent speaks of "partial certification", he refers to the example in that regulation dealing with a facility which was constructed in part before December 31, 1939 and in part after that date. The law prohibits amortization of any facility or part thereof constructed or acquired on or before December 31, 1939. The example, in dealing with such situation, recognizes that the entire cost of the part of the facility constructed after December 31, 1939, is to be amortized over the emergency period. That is the interpretation of Section 124(f)(1), for which petitioner contends. The portion of the facility excluded from amortization, in the Commissioner's example, is that part which could not qualify for certification. It is the physical part of a facility which was not "necessary in the interest of national defense."

In the case at bar, the Board determined the entire facility was necessary in the interest of national defense, but as the Thomas affidavit shows (R. 50, ¶ 21) it then wrote into the certificate the illegal limitation that only the excess war cost of the necessary facility could be used in measuring the amortization deduction. The Board did not determine here that only 35 percent of the physical facilities acquired by petitioner were necessary, but instead attempted

to restrict to 35 percent the amortization deduction of facilities which were 100 percent necessary. In contrast, the Commissioner's example deals with a situation in which only part of the physical facilities were, or even could be, determined necessary to national defense.

This example was placed in the Commissioner's regulation during the period that the War and Navy Departments were allowing entire cost, and *long before the War Production Board had adopted its excess war cost rule in the spring of 1944.* It cannot, therefore, be recognition of the partial certification based on excess war cost referred to in respondent's unpublished memorandum. This will be clear from a comparison of Regulations 111 and respondent's unpublished memorandum (Pet. Br. p. 36-37).

Respondent cannot escape the conflict between the regulations of the Commissioner and the Board. It cannot be explained away. It is a conflict which this Court should resolve.

7. The two Judge opinion of the Court of Appeals was not impartial as Judge Clark from the days of his Senatorship had shown a hostile attitude against the amortization provision, and while he was serving as Senator he expressed an understanding of the statute which directly contradicts the opinion he expressed as a Judge.

This reason in support of petitioner's application was presented with great reluctance. It was prompted by the injustice which petitioner believes has been done. The facts submitted in support of this particular reason for granting the writ are either true or false (Pet. Br. p. 40-46). If they are false, respondent certainly would have challenged them. Instead, he has remained silent. We respectfully submit that his silence shows that he cannot refute the supported assertions that Judge Clark as Senator placed a different interpretation on Section 124

when it was passed by Congress than he did when he as a Judge interpreted the identical section.

Respectfully submitted,

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